No. 04-630

Supreme Court, U.S.
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In The

Supreme Court of the United States

JOHN A. RULLÁN, Secretary of the Puerto Rico Department of Health,

Petitioner,

v.

CARLOS MORALES FELICIANO et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARLOS V. GARCÍA GUTIÉRREZ
Counsel of Record
MANUEL A. RODRÍGUEZ BANCHS
ALEJANDRA BIRD LÓPEZ
CIVIL ACTION AND EDUCATION CORPORATION
Mercantil Plaza Building, Suite 720
2 Ponce De León Avenue
San Juan, PR 00918-1611
TEL. (787) 753-6999
FAX (787) 764-7666

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Whether a Secretary of Health has standing or is otherwise legally entitled to challenge a district court's refusal to terminate prospective relief regarding the delivery of correctional health services where he does not have authority for the delivery of such services and the person with such authority, the Administrator of Corrections, has not challenged the order denying termination of such relief.

Whether, under the Prison Litigation Reform Act and applicable equitable principles, a district court may validly approve prospective relief requested by both parties which entails the creation of a non-profit corporation to deliver correctional health care services to inmates where, despite a myriad of failed attempts to remedy constitutional violations over the course of eighteen years, serious widespread constitutional violations in the area of correctional health care continue to exist and the only other proposed alternatives are a full scale receivership or a continuation of the existing arrangement which results in a substantial number of constitutional violations.

Whether under the Prison Litigation Reform Act, 18 U.S.C. §3626(b), prospective relief can be determined to be void *ab initio* or terminable under 18 U.S.C. §3626.

Whether a district court considering termination of prospective relief under the Prison Litigation Reform Act may take into consideration the circumstances under which that prospective relief was requested by both parties and approved by the district court, require the party moving for termination to present its evidence first, prevent the discovery and presentation of evidence which, based on the proponent's offer of proof, is not relevant to the issues and controversies before the court.

PARTIES TO THE PROCEEDINGS

Appellant in the Proceedings Below Before the United States Circuit Court of Appeals for the First Circuit

Defendant Secretary of Health for the Commonwealth of Puerto Rico, John A. Rullán.

Appellees in the Proceedings Below Before the United States Circuit Court of Appeals for the First Circuit

Plaintiffs Carlos Morales Feliciano, Eliud Martínez Montalvo, Raymond Rivera Ríos, Hector Luis Serrano Labrador, Diana Ramínrez Tousset, individually and as representatives of the entire class of persons under the custody of the Administration of Corrections of the Commonwealth of Puerto Rico.

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STATEMENT OF THE CASE

This case is a class action by prisoners against various government officials including the Honorable John Rullán, Secretary of the Department of Health (Petitioner here, alternatively referred to as "Defendant Rullán" with respect to the proceedings below). Defendant Rullán requested the "nullification" or, in the alternative, termination of relief previously entered in the case based on the Prison Litigation Reform Act (hereinafter "PLRA"). The United States District Court for the District of Puerto Rico held hearings at which Defendant Rullán presented evidence. Based on that evidence, the district court entered an order denying the request for "nullification" or termination because neither action was warranted under the PLRA. Defendant Rullán filed an appeal to the United States Circuit Court of Appeals for the First Circuit which affirmed the district court's decision. Defendant filed this Petition for a Writ of Certiorari before this Court. This brief is in opposition to that request.

A. Nature of the Case and Procedural Background:

In early 1979 this class action was filed against various public officials of the Puerto Rico government challenging the constitutionality of conditions in Puerto Rico's adult correctional system, the Administration of Corrections. Since that time, Defendañts in this litigation have been subject to court orders to improve the delivery of health care services to inmates dating back to the court's preliminary injunction of 1980. *Morales Feliciano v. Romero Barceló*, 497 F. Supp. 14 (D. Puerto Rico 19[80]). In 1986, the court found "widespread noncompliance" with ordered remedial relief, and entered further orders in the case. *Morales Feliciano v. Romero Barceló*, 672 F. Supp. 591 (D. Puerto Rico 1986). In December 1989, further steps were taken to address constitutional violations including an agreement between the Administrator of

Correction and the Secretary of Health to transfer primary responsibility for correctional health services to the Department of Health.[1] It was not until this time that the Secretary of Health was included as a Defendant in this case. The plans were approved by the Court in October of 1990.

Developments in 1997, further altered the remedial framework of correctional health services. In April 1997, an expert appointed by the district court filed a report on the state of compliance with the correctional health orders in the case. This expert found that the Correctional Health Program continued to be plagued by bureaucratic and administrative inefficiencies which significantly impeded the development of a correctional health system capable of meeting constitutional standards. Emergency measures were immediately ordered by the court at the joint request of the parties to address some of the most pressing of these problems faced by the Correctional Health Program.[2] Based on his findings, the district court's expert

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[1] Under Puerto Rico law, the responsibility for the provision of health services to inmates housed in penal institutions is assigned to the Administration of Correction. Law 116, of 22 June 1974, as amended, 4 P.R.L.A. §1112(f) (Supp. 2000). Accordingly, the Secretary of Health's authority over the delivery of health care services to inmates under the custody of the Administration of Corrections came as a direct result of the medical and mental care plans consented to by the parties and adopted by the court in this case.

[2] *E.g.*, *Order that the Chief Correctional Health Care Coordinator Take All Necessary Contractual Steps to Maintain Continuity of Services to Inmates in the Custody of the Administration of Corrections*, (Dkt. #6558); *Order Regarding Compensation Scale for Correctional Health Employees and Contractors* (Dkt. #6830); *Order Regarding Purchase of Vehicles for Correctional Health Program* (Dkt. #6855); *Order stating that Dr. Ernesto Torres Arroyo, MD as Executive Director of the Correctional Health Program shall take all necessary steps to enforce his line of authority, etc.* (Dkt. #7573); *Endorsed Order of 6/30/97 regarding Joint Motion Stating the Fiscal Arrangements Which Shall Be Made to Pay for the Professional Services Contracted for by the Chief Health Care Coordinator Pursuant to the Court's order of 16 May 1997* (Dkt. #6567).

emphatically recommended the appointment of a receiver.[3] This recommendation was opposed by both Defendants and the Plaintiff Class and numerous filings were made on this matter.

The alternative proposed by the Plaintiff Class was the creation of a private non-profit correctional health services corporation which would grow out of the Correctional Health Program, and whose primary purpose would be to provide health care services to persons held in the institutions operated by the Administration of Corrections, in accordance with the Medical and Mental Health Plans approved by the court. The proposal was based on both the need to release the correctional health care system from a constricting and inflexible bureaucratic structure and on the new public health care environment existing in Puerto Rico. In 1993, the Puerto Rico Health Insurance Administration was created, 26 P.R.L.A. §7001 et seq., in an effort

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[3] Following is a brief excerpt of the court appointed expert's testimony explaining his recommendation:

> . . . [I]t is my opinion that there is virtually no likelihood that the defendants, left to their own devices, will ever achieve compliance with the court's orders in the areas of medical and mental health care or will ever provide services in these areas that comport with even the most basic constitutional requirements. I base this opinion on the ineffectiveness and apparent half-heartedness of defendants' attempts . . . as well as on indications . . . of a trend toward even greater restraint of the program's activities.
>
> Moreover, I do not believe that the imposition of traditional sanctions in the form of fines will be effective to coerce compliance. . . .
>
> For these reasons, it is my opinion that the court should move promptly to appoint a receiver with ample authority to manage the Correctional Health Program free of all constraints of Commonwealth law . . . I believe that only a fully empowered receiver can overcome the bureaucratic morass that comprises the Department of Health,. . . . and other governmental agencies that are impeding the efforts of the Correctional Health Program.

to reform Puerto Rico's health care system. AFASS (Administration for Health Facilities and Services), the agency charged with administering public health care facilities was dissolved, virtually all public health care facilities were slated to be sold, and the delivery of government health services was placed in the hands of the Administration of Health Insurers, together with private insurers and private health care corporations.

Based on the serious administrative difficulties faced by the Correctional Health Program as presented by the court's expert, and on the fact that the Correctional Health Program would be left practically alone as a government dependency providing direct health care services, and completely dependent on the private sector for many of its operations, the remedy involving the non-profit health care corporation was developed as a sensible and appropriate solution. In this way, correctional health operations could hopefully be extricated from the trappings of bureaucratic inefficiency and political indifference which had until then posed such significant obstacles to the evolution of correctional health services while creating a structure which was consistent with the existing public health environment. Defendants eventually accepted Plaintiffs' proposal and a joint request was presented to the court to allow the development and funding of the organization of a non-profit corporation.

Subsequently the district court, in a detailed published opinion, (Pet. for. Cert. at 89a-251a), found the continuing violation of correctional health orders, as well as the ongoing violation of the constitutional rights of members of the Plaintiff Class in the area of health care. (*Id.* at 212a.) The district court further found that the injunctive relief entered in the case was necessary, narrowly drawn, the least intrusive and extended no further than necessary. *Id.* at 234a. Moreover, the court indicated, "the court must take necessary steps to assure that its orders and judgment are obeyed and that the violations of plaintiffs' Federal rights cease," indicating that in order to

do so, "the court will build on the remedial structure that is already in place." Based on these findings and on the parties' joint proposal for the establishment of the correctional health services corporation, the district court withheld its decision regarding the appointment of a receiver, in order to consider the parties' joint proposal.[4] Thereafter, the court adopted the joint proposal, and has since actively overseen and promoted the development of the private non-profit correctional health services corporation (hereinafter "the non-profit corporation"). Based on periodic information provided to the district court, the court approved disbursements to fund the establishment of the private non-profit corporation.

The elections of November of 2000 resulted in a change of administration from the New Progressive Party, which had been in power since 1992, to the Popular Democratic Party. At that time, Defendant Rullán raised a challenge to the validity of prospective relief relating to the non-profit corporation. (Pet. for Cert. at 261a-279a.) In July of 2002 the United States Court of Appeals for the First Circuit rejected Defendant Rullán's arguments.

B. Events in the District Court Relating to the Order Appealed from in this Case and Proceedings before the First Circuit Court of Appeals:

In October of 2003, Defendant Rullán filed a motion seeking "nullification" or termination of the prospective relief relating to the non-profit corporation. Plaintiff Class opposed Defendant Rullán's motion and cross-moved for termination of certain relief in the case, including the portion of the medical care plan which transferred primary

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[4] On behalf of Defendants, the Attorney General of the Commonwealth of Puerto Rico signed the incorporation papers for the "Correctional Health Services Corporation" and appointed the first board of directors of the corporation.

authority and responsibility for the delivery of correctional health care services from the Administrator of Corrections to the Secretary of Health, Defendant Rullán. Plaintiffs also moved for the termination of certain relief authorizing purchasing and contracting authority to officers heading the Correctional Health Program without the need to comply with Puerto Rico law.[5] On 18 November 2003, Defendants joined in the Plaintiffs' cross motion to terminate the mentioned relief, stating that they "d[id] not agree with plaintiffs' conclusion that the termination will place individual responsibility for the delivery of health care under the Department of Corrections."

The district court scheduled hearings to commence on 4 November 2003. At that time, the district court required Defendant Rullán, as the moving party, to begin with the presentation of his evidence. Moreover, the district court bifurcated the presentation of evidence ordering that evidence would first be heard on compliance with the Medical and Mental Health Plans and the supposed lack of current and ongoing constitutional violations. Based on that evidence the district court would determine whether it was necessary to hear any evidence on whether the challenged prospective relief was least intrusive, narrowly drawn and extends no further than necessary.

Over the course of several weeks Defendant Rullán presented the testimony of several correctional health officials, an expert in medical, mental and dental correctional health and administration, and the Administrator of Corrections. In addition, extensive documentary evidence was admitted. On cross-examination and based on the analysis of the documents admitted into evidence, Plaintiffs showed that Defendant Rullán's own evidence proved

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[5] As mentioned above, *see* supra note 2, these orders had been undertaken on an emergency basis to address some of the most pressing problems faced by the Correctional Health Program as revealed by the Court Expert's 1997 Report on Correctional Health and the hearings on this report.

that constitutional violations continue to exist in the area of medical and mental health care and that these present serious threats to the health and bodily integrity, and even the lives, of inmates. (Pet. for Cert. at 37a-53a.) After the presentation of this evidence Defendant Rullán rested on the issues of alleged compliance with the Medical and Mental Health Plans and the supposed lack of current and ongoing constitutional violations.

Upon conclusion of Defendant's presentation of evidence on the issues of compliance and constitutional violations, Plaintiff Class made a motion under Fed. R. Civ. P. 52(c) in open court requesting that the district court make a partial ruling with respect to the issue of current and ongoing constitutional violations on the basis that the very evidence presented by Defendant Rullán showed that such violations continued to be current and ongoing with respect to the delivery of health care services to members of the Plaintiff Class. Plaintiffs also requested that Defendant Rullán make a proffer regarding the evidence they expected to present to support their contention that the prospective relief concerning the non-profit corporation was neither the least intrusive, nor narrowly drawn and extended further than necessary under the PLRA.

Defendant Rullán opposed the motion by Plaintiffs arguing that improvements in correctional health care services showed that there were no ongoing constitutional violations. When pressed by the district court to describe what evidence would be presented to show that the prospective relief did not meet the "least intrusive, narrowly drawn, extends no further than necessary" requirement under the PLRA, Defendant Rullán responded through counsel with generalized allegations that (1) the non-profit corporation has never before provided the type of medical services required and, therefore, there is no evidence that they would actually be able to provide them, (2) the non-profit corporation may not be "acting in conformity with state law," (3) the government is not adequately represented in the operations and decisions of

the non-profit corporation, and (4) that the non-profit corporation may have contracted and/or subcontracted with other private corporations. Moreover, with respect to some of these matters, Defendant Rullán anticipated the need for additional time to take discovery, including depositions and document requests. Based on this proffer, Plaintiffs argued that any further evidence was unnecessary because (1) constitutional violations had been proven by Defendant Rullán's own evidence, and (2) none of the evidence envisaged or anticipated by Defendant Rullán was relevant to the "least intrusive, narrowly drawn, extends no further than necessary" requirement under the PLRA. Under such circumstances termination was not only inappropriate but *prohibited* under the PLRA, 18 U.S.C. §3626(b)(3) ("Prospective relief *shall not* terminate. . . . ") (emphasis added). Plaintiffs, therefore, moved that the entire matter be disposed of by the court without the need for further presentation of evidence. The court directed the parties to submit their positions on the issue in writing in ten days. The parties did so.

On 26 January 2004, the district court issued an order finding that, despite some modest administrative and staffing improvements, constitutional violations of the rights of members of the Plaintiff Class in the areas of medical and mental health care continue to exist and are current and ongoing. (Pet. for Cert. at 30a-88a.) Moreover, the district court analyzed the prospective relief concerning the non-profit corporation and determined that, in view of available alternatives and previous efforts undertaken in the case ranging from the general to the highly specific, and considering the currently existing health care landscape in Puerto Rico, the relief creating the non-profit corporation extends no further than necessary and is the most narrowly tailored and least restrictive alternative capable of correcting the ongoing constitutional violations. Moreover, the district court found that the presentation of the evidence proffered by Defendant Rullán was unnecessary to a determination on this matter because it added

nothing to the "least intrusive, narrowly drawn, extends no further than necessary" requirement under the PLRA.

The court, further, granted Plaintiffs' cross motion to terminate certain court orders, including the portion of the Medical and Mental Health Care Plans which transferred primary responsibility for correctional health services from the Administration of Corrections to the Department of Health. The cross-motion, it should be recalled, was joined by all Defendants and its approval did not form part of Petitioner's appeal before the First Circuit. With respect to the Defendants' contention that they would continue to abide by the interagency agreement which transfers primary authority for the delivery of health care services to the Secretary of Health, a move that the district court characterized as "the disastrous present arrangement[ ]," the district court was careful to warn that "[t]hey will of course do so at their peril." (*Id.* at 80a.)

Defendant Rullán appealed to the First Circuit, which affirmed the district court's decision. At that time Defendant Rullán approached Plaintiff Class through counsel to continue the process of implementing the remedy regarding the non-profit corporation. App. 1. Nevertheless, Defendant filed a petition for certiorari seeking review of the First Circuit's decision.

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED

I. The Court Does Not Have Jurisdiction to Entertain the Issues Raised by the Petition for Certiorari since Petitioner Does Not Have Standing to Bring the Present Case before the Court.

The Article III judicial power to decide only cases and controversies means, at a minimum, that the Supreme Court can exercise its jurisdiction only in the context of adjudging "the legal rights of litigants in actual controversies." *Liverpool S.S. Co. v. Commissioners of Emigration*,

113 U.S. 33, 39 (1885). As an incident to the elaboration of this constitutional command, the Court has long required that a litigant have standing – or be in actual controversy with the opposing party – to challenge the action sought to be adjudicated. For purposes of justiciability and standing, therefore, such a case must involve a controversy between the named parties that is "definite and concrete, touching the legal relationships of parties having adverse legal interests[.]" *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937); *see also Baker v. Carr*, 369 U.S. 186, 204 (1962).

The requirements to meet standing to sue and pursue relief at all levels of federal litigation were clearly established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) in Justice Scalia's opinion for the Court:

> Over the years our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized,[1] and (b) actual or imminent, not conjectured or hypothetical[.] Second there must be a causal connection between the injury and the conduct complained of – the injury has to be traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.
>
> The party invoking federal jurisdiction bears the burden of establishing these elements.
>
> > n1 By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

Lujan, 504 U.S. at 560-561.

The Petitioner fails to meet these standards because he has not established an individual, personal injury. The

Petitioner in this case and the only appellant in the appeal to the First Circuit below, (Pet. for Cert. at 1a-29a), is the Secretary of Health, John A. Rullán. As a result of proceedings before the district court he no longer has authority for the delivery of health care services to prisoners under the custody of the Administration of Corrections. As mentioned above, under Puerto Rico law, legal responsibility for the provision of health services to inmates housed in penal institutions is assigned to the Administrator of Corrections, 4 P.R.L.A. §1112(f), but pursuant to prospective relief entered in this case in 1990 the Administrator of Corrections and the Secretary of Health agreed to transfer responsibility for correctional health services to the Department of Health. It is only as a result of this arrangement that Puerto Rico's Secretary of Health became a Defendant in this case. This arrangement was terminated, however, as a result of a cross-motion to terminate this and other relief in the case filed by Plaintiff Class and joined by all Defendants, including Petitioner.

The Administrator of Corrections is therefore the state officer with sole legal responsibility for the delivery of health care services to members of the Plaintiff Class, and, as a consequence has sole authority to challenge the district court's intervention to the extent that it might be deemed improper. Petitioner, however, has insisted on his challenge to relief relating to the delivery of health care services to the Plaintiff Class, despite the fact that he is no longer the state official charged with that responsibility. Nevertheless, at this time, Petitioner's involvement in the delivery of health care services to the members of the Plaintiff Class is completely subject to the authority and discretion of the Administrator of Corrections. The Administrator of Corrections is the only state official entitled to make final decisions regarding the delivery of health services to inmates under his custody and would, in any event, be the state official with standing to challenge the relief in question.

But the Administrator of Corrections has not challenged the relief ratified by the district court. Not only did he not appeal the district court's refusal to terminate this relief, nor participate in petitioning this Court for relief, but he has instead unequivocally stated his intention to proceed to implement the relief concerning the non-profit corporation. *See* Appendix, 2-3. There is, therefore, no way for Petitioner to claim or define a personal injury based on the continuation of the prospective relief relating to the non-profit corporation and, as a result, he does not have standing to request certiorari in this case or otherwise challenge the district court's decision. *See Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (A person has no standing to challenge another person's sentence where the other person elected to forgo his right of appeal.).

II. Even Assuming that Petitioner Had Standing to Present the Petition for Certiorari this Court Should Not Grant Certiorari in the Present Case Because Several Factors Urge Against the Exercise of the Court's Discretion to Grant Certiorari.

This Court does not generally address issues not decided or fully considered by the courts below. *See* e.g., *Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-254 (1999). While there can be no doubt that counsel for the Petitioner raised, various and sundry arguments challenging the prospective relief which required the creation of the non-profit corporation, the argument relating to limits upon the district court's equity jurisdiction (Pet. for Cert. at 9-13) was not raised until the appellate stage and the issue of Eleventh Amendment immunity (Pet. for Cert. at 13-15) is raised for the first time in the petition for certiorari.

With respect to the argument relating to limits upon the district court's equity jurisdiction, Petitioner cites only one case in alleged support of his argument, the merits of which are more fully considered below. The argument relating to Eleventh Amendment immunity was neither

argued by Petitioner at the district court or appellate levels, nor was it raised in any way by the opinions of either court. Even now, Petitioner raises the point without offering any detailed analysis of applicable authority, choosing instead to invoke the Eleventh Amendment in only the most general terms as standing for the general principle that state sovereign immunity limits the grant of judicial authority to district court's under Article III. (Pet. for Cert. at 13-15.). Additionally, Petitioner decries a "radical departure" from the normal course of termination proceedings under the PLRA (Pet. for Cert. at 27), and yet cites no authority for that proposition.[6] This is not the sort of properly researched, well developed and reasoned argumentation which will allow this Court to give lower court's appropriate guidance in making proper decisions. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued.").

Moreover, the argument that the district court simply does not have authority under any circumstances to issue the type of relief approved in this case and the argument that prospective relief issued without the required PLRA findings is void *ab initio* rather than terminable, are truly extraordinary in that few if any opinions, either at the district court level or at the circuit court level, have considered them. Thus, the Court should allow these significant issues to be addressed by the lower courts in the first instance. *See, e.g., United States v. Mendoza*, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); *E.I. duPont*

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[6] Although this argument was raised before the district and appellate courts, the argument relies on mischaracterizations of the district court's decision, has morphed over time and has never relied on any clear legal authority.

de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task. . . . "); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (on denial of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."). Contrary to Petitioner's claim that the First Circuit's ruling is "directly contrary" to rulings made by other circuits, (Pet. for Cert. at 3-4, citing the decisions of five other circuits), there is no conflict in the circuits with respect to the validity of prospective relief under the PLRA until it is challenged in a motion to terminate. No court has ever concluded that the PLRA renders certain prospective relief null or voidable. Although the cases cited by Petitioner discuss the statutory requirements for the issuance of prospective relief and the termination of prospective relief under certain circumstances, none of these cases stand for the proposition that prospective relief can ever be voided or nullified under the PLRA. The purported "conflict in authority," is therefore nonexistent.

Moreover, the issues presented by Petitioner are not compelling or important enough to warrant review. If, as Petitioner claims, the present case is the second oldest active institutional prison conditions case in the nation (Pet. for Cert. at i),[7] then certainly the long history of frustrated attempts to address constitutional violations,

[7] At this time Respondents can neither confirm nor deny this claim since this would require an inventory of existing institutional reform cases to determine which are prison conditions cases and a corresponding evaluation of each case's public record to determine which continue to be actively litigated. However, it is certainly true that this is one of the oldest institutional reform cases in the country in which rampant constitutional violations continue to exist.

repeated disappointments, moderate successes, eventual backsliding, to say nothing of the infighting and political power struggles, all of which have required ever more specific, exacting and innovative solutions in this case are not commonplace enough that a resolution of the questions presented here would be capable of providing guidance to any wide class of litigants in other cases. The prospective relief in question here responded to an extraordinary nineteen year history of active attempts to end constitutional violations in the area of correctional medical and mental health care, and was specifically tailored to major changes in the way public health would be administered in Puerto Rico. Thus, the special and particular circumstances surrounding the prospective relief in this case militate against the exercise of certiorari jurisdiction by this Court.

III. Even Assuming that Petitioner had Standing to Present this Case and that this Court Chose to Address this Case on the Merits, the Result below Would Still Be Correct Because Federal District Courts Have Legal Authority to Issue the Type of Prospective Relief Entered in this Case.

Defendant Rullán challenges the prospective relief concerning the non-profit corporation arguing that (1) federal courts lack equitable power to issue prospective relief mandating the "privatization" of a correctional operations area, because such relief was unavailable in equity jurisprudence before the enacting of the first Judiciary Act of 1789, (2) the Eleventh Amendment prohibits the issuance of such prospective relief, and (3) the PLRA generally prohibits the issuance of such prospective relief.

To support this argument with respect to the court's equitable power, Petitioner relies on a single case, *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). This case is inapposite for it does not

stand for the proposition that federal courts lack equitable power to issue prospective relief mandating "privatization."[8] In the *Grupo Mexicano* case, an unsecured creditor suing to collect on a debt after default sought and obtained an injunction preventing the debtor from transferring assets in order to assure collection of a money judgment if one were eventually handed down in the case. This Court reversed, ruling that, prior to entry of a money judgment, a district court lacked power to issue an injunction preventing the transfer of assets in which no lien or equitable interest was claimed. *Id.* This is not because the injunction in the case was so radical and outlandish that it could not be considered a classical injunction, but because claims for money judgments are traditionally considered actions at law in which equitable remedies are not ordinarily available.[9] The Court clarified that Congress was free to enact legislation which might allow the issuance of such a remedy if it so chose. *Grupo Mexicano*, 527 U.S. at 322 ("When there are indeed new conditions that might call for a . . . departure from past practice, Congress is in a much better position that we . . . to perceive them and to design the appropriate remedy.")

Contrary to the situation in the *Grupo Mexicano* case, here there is clear legislative authority for an equitable remedy: "Every person who, under color of [state law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

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[8] It certainly bears noting that Petitioner's characterization of the relief in this case as a "privatization remedy" is a gross oversimplification which tends to depict the relief at issue as tremendously detrimental to Defendants. It must be remembered that the relief in question was developed and agreed to by both parties and stipulates that the non-profit corporation will be established and overseen by the Defendants themselves and financed by the district court.

[9] *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002).

immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, *suit in equity*. . . . " 42 U.S.C. §1983 (emphasis added).

Federal district court equitable power to issue injunctive relief is beyond question. Injunctions certainly were known to equity for several centuries before 1789. Petitioner means that an injunction ordering a defendant to set up a private non-profit corporation to provide health care to prison inmates was never issued by any court of equity before that date. Since prison administration was in the hands of private persons allowed to exploit inmates for their own private benefit, there is little chance that Chancery or any other court of equity would issue an injunction to privatize the private operations of any prison. Petitioner also forgets that before 1789 nobody ever issued an injunction to racially integrate school districts or, much less, issue busing injunctive orders and plans to achieve racial integration. The mere fact that injunctive relief might be characterized as drastic or even radical does not make it illegal, although such relief may be inappropriate if not warranted under traditional equity principles. Here, Petitioner has not shown that, under the factual and historical circumstances of this case and applicable equitable principles, the prospective relief approved by the court was in any way prohibited.

As mentioned above, the argument relating to Eleventh Amendment immunity was brought by Petitioner for the first time before this Court. Moreover, Petitioner does not explain how the district court's decision in this case violates Eleventh Amendment principles other than to make generalized allegations about state sovereignty. Under this Court's precedent state officials are subject to injunctive relief, *see e.g.*, *Ex Parte Young*, 209 U.S. 573 (1908). No reasoned analysis of case law is set forth to demonstrate how the Eleventh Amendment prohibits the injunctive relief issued here. Petitioner simply keeps coming back to the fact that this relief contemplates the involvement of a private corporation.

Petitioner characterizes the prospective relief in this case as an "intervention in the relationship between the states and their political subdivisions." (Pet. for Cert. at 3.) Of course the relief in question does nothing to intervene in the relationship between the Commonwealth of Puerto Rico and its political subdivisions, although it does define the manner in which certain government services will be administered. Moreover, the cases cited by Petitioner do not support the proposition that federal injunctive relief to address the continuing violation of constitutional rights may not touch upon the relation between States and their political subdivisions. *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004) (relating to federal legislation dictating the powers that States and municipalities of the state could and could not exercise); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that federal legislation is applicable to States and their political subdivisions).

As Petitioner readily concedes, "broad federal judicial intervention is only held to be warranted when the local authorities are in default." (Pet. for Cert. at 12.) It is difficult to imagine a more clear example of local authorities being in default. For the past twenty-five years, in an actively litigated case the district court has repeatedly found constitutional violations in the areas of medical and mental health care with only occasional and quite modest improvements in certain areas. As the district court summarized in its opinion of 26 January 2004: "The remedies fashioned by the Court to correct the constitutional violations pertaining to Plaintiffs' rights in the area of medical and mental health care have run the gamut from general injunctions, to more specific injunctions, to detailed and itemized plans, to pertinent modifications fine tuning particular portions of those plans, to complementary orders addressed to particular obstacles to the delivery of adequate care to inmates . . . " (Pet. for Cert. at 63a.) While it is certainly true that throughout the years prospective relief regarding the mental and medical health care offered to inmates in this case has become increasingly inventive and assertive, it is equally true that

district courts have a continuing duty to ensure that their orders are respected; the alternative, doing nothing and allowing continuing violations of civil rights to go unaddressed, is unacceptable.

Petitioner also makes a generalized argument that the PLRA forbids the type of relief challenged here (Pet. for. Cert. at 17), based on the general purpose of the PLRA to reduce unnecessary intrusion by federal courts in State correctional operations. Petitioner incorrectly asserts that some equitable remedies have been eliminated under the PLRA. (*Id.*) Although the PLRA defines the circumstances under which prospective relief may be issued generally and limits the circumstances under which certain types of orders (such as prisoner release orders, prison construction, appointment of Special Masters) may be issued, no particular type of prospective relief was prohibited under the PLRA under any and all circumstances.

Moreover, any suggestion that the issues raised by Petitioner involve the subject matter jurisdiction of the district court and therefore cannot be waived (Pet. for Cert. at 3), merely constitutes an attempt to insist on issues raised in an untimely manner. Subject matter jurisdiction in the case is predicated on 28 U.S.C. §1331, based on 42 U.S.C. §1983 and the Fifth, Eighth and Fourteenth Amendments of the United States Constitution. At best, Petitioner's argument attempts to question what type of relief is and is not available under 42 U.S.C. §1983, but this detracts nothing from the subject matter jurisdiction of the court.

As mentioned above in section II of this brief, the argument relating to limitations on the district court's equitable power and Eleventh Amendment immunity were untimely, and should be rejected as insufficiently developed below. *United States v. Alvarez-Sánchez*, 511 U.S. 350, 360 n.5 (1994). These challenges to the validity of the jointly requested and court approved prospective relief

here at issue came so incredibly late, it is difficult to fathom any possible contention that they could not have been raised earlier. Although under the PLRA a party may under certain circumstances challenge the *continued* validity of prospective relief, any challenge based on the validity of the court approved relief at the time it was issued in 1998 is at least three years late. Although Petitioner was not in office in 1998, he spent three years in office (since January of 2001) prior to bringing these challenges to the court approved stipulation.

In other words, Petitioner, aware from day one of the substance of this prospective relief, idly sat by as millions of dollars continued to be invested in this remedy without making any formal challenge to the stipulation's validity at the time. As a result, this Court should conclude that Defendant Rullán has waived these arguments. *Putnam Resources v. Pateman*, 958 F.2d 448, 456-57 (1st Cir. 1992) (explaining that an aggrieved party must act expeditiously to cure perceived error); *see generally*, *United States v. Taylor*, 54 F.3d 967, 972 (1st Cir. 1995) (stating that "a litigant who deems himself aggrieved" by a ruling of the trial judge "ordinarily must object then and there, or forfeit any right to complain at a latter time").

The appellate court was, therefore, correct to affirm the decision of the district court.

IV. The Relief Challenged in this Case Was Valid at the Time it Was Entered in 1998 and Any Defect under the Prison Litigation Reform Act Was Cured by the District Court's Hearing and its Opinion of January 2004.

Petitioner asserts that at the time the district court approved the prospective relief in this case in 1998 it did not make the findings required under the PLRA. 18 U.S.C. §3626(a)(1)(A) (requiring findings that "relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive

means necessary to correct the violation of the Federal right"). Based on this assertion Petitioner argues that the relief approved in 1998 is void *ab initio*. Both conclusions are incorrect.

It is extremely important to remember that this remedy was chosen as a less restrictive alternative to receivership, the only other alternative proposed. At the time, the district court heard evidence regarding the two alternative remedies proposed to address those constitutional violations. Dr. Ronald Shansky, M.D., who was qualified as an expert in general medicine, internal medicine and in prison medical administration: "[. . .] I believe that there needs to be a structure with the requisite resources and authority and usually that is rested in an individual ultimately to accomplish those necessary things with regard to personnel, equipment, physical plant issues, coordination with custody in as quick a time as possible." Dr. Aida Guzmán, MD, then Chief Health Care Coordinator of the Correctional Health Program, testified that: "[P]rivatization . . . will . . . minimize all these bureaucratic problems that we face today. . . . " She further stated "that as a final solution it will be a good idea to consider this privatization in a non for profit corporation type of setting." Dr. Lambert King, M.D., was qualified as an expert in internal medicine, in correctional health care, the administration of health care programs, in health care administration within an institutional setting and in medical education. Dr. King believed "that the issue of providing sufficient and predictable financial support, the issue of the requisite administrative and a medical flexibility to recruit staff and contract with outside health agencies and companies could be addressed in the context of a sole source non-profit corporation[.]" Dr. Magaly Maldonado, M.D. testified as to how the non-profit corporation might be structured and how this would work within the health delivery system in Puerto Rico. Then Secretary of the Treasury Manuel Díaz Saldaña testified regarding the structure of the non-profit corporation and the support it was receiving from the government.

The hearings on the crisis of the CHP in 1997 were a three-cornered fight, with the court's expert witness relentlessly persisting on the need to appoint a receiver: the district court did not merely approve one remedy over the other. The difficulties which the court and the parties faced were amply set out in the testimony of highly qualified experts on health care delivery and the Court decided to start a remedial process which clearly would require time to develop. If this remedy fails, then the parties' and the court's fall back position would probably be the receivership on which the court refused to pass in 1998.

In its May 1998 order, the district court, after making particularized findings regarding ongoing constitutional violations, found that "it is necessary, to protect the members of the Plaintiff Class from cruel and unusual punishment through constitutionally unacceptable health care services, to continue in full force, [its previous remedial relief]," finding that such relief "extends no further than is necessary," "is narrowly drawn," and "[t]here is no less intrusive means to correct the violation of plaintiffs' Federal rights." *Id.* Based on the failure of such relief, by itself, to correct constitutional violations, the district court found that more vigorous relief was warranted:

> The court at this time will not decide whether or not to appoint a receiver, and under which circumstances and conditions such a receiver can and should be appointed. But *the court must take the necessary steps to assure that its orders and judgment are obeyed* and that the violations of plaintiffs' Federal rights cease. *To do so the court will build on the remedial structure that is already in place.*

Id. (emphasis added). After requesting further information regarding the joint proposal of the parties for the creation of a non-profit corporation, the district court warned, "[t]he parties are all on notice that should the court be disappointed in its rightful expectations, it will not hesitate to reach the ultimate issues raised in this matter," *id.*

at 1243-1244, clearly referring to the possibility that a receivership would be ordered.

Any claim that the district court's decision was not couched in repetitions of the statutory language in the PLRA should not suggest that the court failed to make the necessary findings. The evidence presented to the district court had plainly revealed that without some sort of aggressive action, constitutional violations would continue to exist. By ultimately approving the stipulation relating to the non-profit corporation, the district court clearly chose the least restrictive from the two proposed alternatives (1) receivership, and (2) government created non-profit corporation. Courts have consistently rejected the need for particular recitations of verbal formulae and ritual or talismanic incantations in reviewing the propriety of lower court rulings. *United States v. Kelley*, 359 F.3d 1302, 1305 (10th Cir. 2004) ([a sentencing guidelines case] "We do not require 'a ritualistic incantation to establish consideration of a legal issue,' nor do we demand that the district court 'recite any magic words' to show us that it fulfilled its responsibility to be mindful of the factors that Congress has instructed it to consider."); *Ancho v. Pentek Corp.*, 157 F.3d 512 (7th Cir. 1998) (Trial judges are not required to recite the standard as though it were some magical incantation); *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989) ([a social security case] "[O]ur cases do not require such an incantation."). The district court's conclusion that the joint stipulation constituted a necessary, narrowly drawn and least restrictive method extending no further than necessary to correct constitutional violations is aptly supported by the May 1998 opinion and the evidence supporting that opinion, as well as by the long and laborious remedial history of the case.

Moreover, even if it were true that the district court entered the prospective relief without making the necessary findings, this in no way would render the prospective relief void *ab initio* as Petitioner asserts. Petitioner hinges this argument on an alleged lack of clarity in the statute:

"Although the statute itself is not crystal clear on the matter. . . . " (Pet. for Cert. at 20.) Frankly, the statute could not be any clearer:

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. §3626(b)(2) (emphasis added). The statutory language is therefore clear that prospective relief which is not supported by the findings required by the PLRA is not void or voidable, but rather terminable. *See* 18 U.S.C. §3626(b)(1-4) (which discusses the "termination" rather than the nullification of prospective relief).

Defendant Rullán tenaciously insists that such relief is void or voidable rather than terminable. The only courts to have examined the issue disagree:

> Nothing in the PLRA or its legislative history speaks of vacating consent decrees. . . . While terminating a consent decree strips it of future potency, the decree's past puissance is preserved and certain of its collateral effects may endure. . . . [N]othing in the PLRA even hints that consent decrees must be vacated when prospective relief is terminated. . . .

Inmates of Suffolk County Jail, 129 F.3d 649, 662 (1st Cir. 1997); *see also Benjamin v. Jacobson*, 172 F.3d 144, 159 (2nd Cir. 1999).

Petitioner was merely entitled to request termination of the prospective relief, which he has now done, and as a result, the district court entered and extensively discussed the findings which support the need for this relief. *See* 18 U.S.C. §3626(b)(3) ("Prospective relief shall not terminate if the court makes written findings based on the record

that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.")

The First Circuit's affirmation of the district court's decision was, therefore, correct.

V. The Decision below Was Correct Because the Evidentiary Hearing on Which the District Court Based its Decision Was Properly Conducted and the Rulings Now Challenged by Petitioner Were Correct and Well Within District Court's Discretion.

Petitioner argues that the procedure followed by the district court constituted a "radical departure" from the normal course of a termination proceeding under the PLRA based on three assertions: (1) the district court allegedly inverted the burden of proof requiring Petitioner to show an absence of constitutional violations, (2) the district court impermissibly considered as part of its decision the Petitioner's predecessor's assent and participation in the consent decree, and (3) the district court disallowed untimely discovery and the presentation of evidence which it deemed irrelevant to the issues remaining to be tried.

The district court *did not* place the burden of proof upon Petitioner. As noted by the appellate court below, the district court required Petitioner, as the moving party, to present his proof first. *See* Fed. R. Evid. 611(a). Nothing in the district court's decision suggests that the decision was rendered on the basis that Petitioner did not meet his burden of proof. To the contrary, Petitioner's own witnesses and documentary evidence showed that without any doubt substantial numbers of prisoners were being

systematically *denied* health care including the diagnosis and treatment of life threatening conditions.

Petitioner also complains that the district court relied too much upon the consent decree in rendering its decision. (Pet. for Cert. at 23.) However, Petitioner does nothing to explain exactly what about the district court's analysis of the consent decree and the circumstances surrounding its submission to the court and approval were actually improper. Obviously as part of its analysis the district court did discuss the consent decree; after all, it was required to determine the extent to which this relief should be continued or terminated based on the evidence that had been presented in court. But, as held by the appellate court, the district court did not rely impermissibly on the agreement.

Moreover, Petitioner is incorrect in his argument that the 1998 court approved stipulation is not enforceable in federal court under the PLRA because it is a "private agreement," and thus not subject to federal judicial enforcement. 18 U.S.C. §3626(c)(2) and §3626(g)(6). The characteristic which distinguishes a settlement agreement from a consent decree is that, although privately negotiated, a consent decree is approved by the court.[10] *See e.g.*,

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[10] Prior to its most recent intervention in the case, the First Circuit had already rejected Petitioner's argument that the stipulation is a private settlement agreement because the district court never approved it:

> The Secretary tries to wiggle off this hook by arguing that we should disregard the stipulation because it was not explicitly entered by the district court. This argument borders on the jejune. The parties docketed the stipulation and, although the district court did not instantly embrace it, the court's subsequent actions – particularly the entry of orders designed to facilitate the establishment of the new remedial framework and the release of funds to finance those activities – made manifest the court's adoption of the concept. In all events, the court certainly believed that it had approved the stipulation and its serial orders put the Secretary on

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Smyth v. Rivero, 282 F.3d 268, 281 (4th Cir. 2001); *Schurr v. Austin Galleries, Inc.*, 719 F.2d 571, 574 (2d Cir. 1983). As such, a consent decree is endowed with the attributes of a contractual agreement between the parties and a judicial order. *Local 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986). Consent decrees are therefore desired and expected by the parties to be enforceable as judicial decrees that are subject to rules generally applicable to other judgments and decrees. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). The district court's approval of the stipulation, its active financial support of the non-profit corporation and its continuous participation in and supervision of the remedy amply attest to the stipulation's status as a consent decree. *See generally*, *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983) (The judicial nature of consent decrees makes their provisions subject to continued judicial policing.); *Murillo v. Texas A & M Univ. Sys.*, 921 F. Supp. 443, 445 (S.D. Tex 1996) (Court approval of settlements is not a perfunctory function.).

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clear notice of its belief. *See, e.g.*, Order of July 2, 1998 (reminding the parties that "correctional health services would soon begin to undergo the transition to a private non-profit corporation"); Order of April 19, 2000 (stating that the court previously had "accepted and ordered the implementation of the parties' stipulations and proposals to create a not-for-profit Correctional Health Services Corporation"). If the Secretary wished to hold the district court to a particular punctilio in the entry of the stipulation, the Secretary had an obligation to assert that position in a timely manner. *See Putnam Resources v. Pateman*, 958 F.2d 448, 456-57 (1st Cir. 1992) (explaining that an aggrieved party must act expeditiously to cure perceived error); *see generally United States v. Taylor*, 54 F.3d 967, 972 (1st Cir. 1995) (stating that "a litigant who deems himself aggrieved" by a ruling of the trial judge "ordinarily must object then and there, or forfeit any right to complain at a latter time"). His failure to do so constitutes a waiver.

(Pet. for Cert. 273a.)

Lastly Petitioner argues that the lower court erred in quashing his "perfectly appropriate subpoenas,"[11] and excluded much of his evidence. These two claims relate to the portion of the hearing which was meant to evaluate Defendant's claim that the prospective relief concerning the non-profit corporation was neither the least intrusive, nor narrowly drawn alternative for relief and extended further than necessary under the PLRA. When requested by the court to make a proffer regarding the evidence he expected to present with respect to this issue, Petitioner alternately advanced several different descriptions of the evidence he would have presented, given the opportunity, and, when pressed for specifics, stated that he would need to conduct further discovery. Petitioner now seems to argue[12] that he was hoping to create an issue, not with

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[11] The subpoenas in question were served upon a number of current and former members of the board of directors of the Correctional Health Services Corporation, as well as employees of that corporation between eight or nine o'clock in the evening the night before their appearance was required. In addition to requiring testimony, these subpoenas included an extensive production of documents which, in summary, required the production of seven years worth of documents including all documents relating to meetings among the board of directors; all documents relating the non-profit corporation's contracts; all documents relating to the corporation's finances; names, addresses and telephone numbers of officers and employees of the corporation; all correspondence between the corporation and outside entities; all documents relating to incorporation; reports generated, prepared, produced or received by the corporation; documents relating to certain projects; documents relating to strategic and long term plans; documents relating to governmental or regulatory analysis; and documents relating to officer and employee expenses, among others. Clearly Defendant Rullán had no idea what he was looking for. Aside from the obvious overbreadth of the subpoenas, no explanation was given as to why this discovery could not have been carried out earlier.

[12] At the time the proffer was made to the court Defendants did not make a coherent argument regarding the relevance of the evidence they wished to advance on this issue. Rather, it appeared that Petitioner wished to raise an inference that the persons operating the non-profit

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respect to the fit between the problems identified and the solution proposed, but with respect to the "adequacy" of that solution. (Pet. for Cert. at 5 and 26.) In other words, Petitioner allegedly wished to argue that the prospective relief should be rejected because it might not be successful at addressing the constitutional violations in question. While a litigant may under certain circumstances be entitled to question the general effectiveness of a remedy,[13] such a challenge is not contemplated by the PLRA. And while, under some circumstances evidence that a remedy may not function efficaciously may overlap with evidence that the remedy is not narrowly tailored, least restrictive and extends no further than necessary, none of the "evidence" proffered by Petitioner would have substantively contributed to the district court's decision on this issue. Therefore, the court decided not to allow the discovery or the presentation of the evidence.

As explained by the district court in its opinion, there are specific reasons why the alternative chosen by the parties and approved by the court make sense in the current public medical and mental health care environment. (Pet. for Cert. at 59a-66a.) Besides generalized allegations to the effect that the prospective relief at issue

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corporation are corrupt or somehow morally reprehensible and/or incompetent. None of Petitioner's claims really raised any serious questions relating to the functioning of the non-profit corporation, and if they had, Petitioner would, of course, be entitled to bring them to the Court's attention for appropriate redress. Nevertheless, such claims, would not in any event, have rendered the relief entered by the Court in 1998 more intrusive, less narrow or more over-extensive; nor would they implicate any serious need to modify that relief.

[13] One would, however, have to question whether such a challenge would be appropriate five years after the prospective relief was originally ordered, three years after Petitioner first had an opportunity to challenge that relief and after millions of dollars have been invested in the project, improving the Administration's medical infrastructure.

here is too broad and extreme, Petitioner has at no point put together a coherent theory regarding exactly what a more narrowly tailored and less restrictive alternative, extending no further than necessary would look like. It is all well and good to claim that the proposed solution is not narrow or restrictive enough, but Petitioner proposes no other alternative at all, and, after twenty-five years in a case in which traditional alternatives have been exhausted, it is difficult to imagine an alternative less restrictive than the current proposal which might actually hold out any hope of success. The Defendants in this case will be in a position to eliminate the federal court's participation in this case only when they finally comply with their constitutional obligations to the members of the Plaintiff Class. Plaintiffs, and surely the district court, would like nothing more.

CONCLUSION

For the forgoing reasons, Respondents ask that the Court deny the Petition for Certiorari.

Dated: San Juan, Puerto Rico, 10 December 2004.

Respectfully submitted,

CARLOS V. GARCÍA GUTIÉRREZ
MANUEL A. RODRÍGUEZ BANCHS
ALEJANDRA BIRD LÓPEZ

COMMONWEALTH OF PUERTO RICO
Department of Justice
P.O. BOX 9020192 SAN JUAN, P.R. 00902-0192

CARLOS A. DEL VALLE CRUZ TEL. (787) 721-7700
Special Counsel FAX. (787) 724-4770

16 de agosto de 2004

VIA TELECOPIER & REGULAR MAIL
Fax (787) 753-6999

Carlos Garcia Gutierrez, Esq.
Civil Action and Education Corporation
Suite 720, Mercantil Plaza
2 Ponce de Leon Avenue
San Juan, Puerto Rico 00918-1611

Re: Carlos Morales Fliciano, et al., v. Sila M. Calderon
USDC-PR, Civil Num. 7904 (PG)

Estimado Garcia Gutierrez:

Please be advised that in light of the August 6, 2004 Court of Appeals decision in the case of reference, we will like to commence discussing with you the implementation of the privatization remedy ordered by the U.S. District Court. It is our wish to conduct this process expeditiously and in an orderly fashion.

Cordially,

/s/ Carlos A. Del Valle Cruz
Carlos A. Del Valle Cruz

c: Luis Sanchez Betances, Esq.
Gerard De Jesus Annoni, Esq.
Eileen Landron Guardiola, Lady
William Graffam, Esq.
Angel Rotger Sabat, Esq.
Nuria Rivera Pachecho, Lady

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

CARLOS MORALES FELICIANO, et al. Plaintiffs vs. SILA M. CALDERON, et al Defendants	CIVIL NO.: 79-4 (PG)

INFORMATIVE MOTION

TO THE HONORABLE COURT:

COMES NOW, defendant Secretary of the Department of Correction (the "Secretary"), Miguel Pereira, and through the undersigned counsel and before this Honorable Court very respectfully States, Alleges and Prays as follows:

1. On November 4, 2004, the Secretary of the Health Department of the Commonwealth of Puerto Rico filed a Petition for a Writ of Certiorari in the United States Supreme Court styled *John a. Rullán, Secretary of the Puerto Rico Department of Health, et al. v. Carlos Morales Feliciano et al.*, No. 04630. The certiorari petition filed by the Secretary of Health seeks review of the judgment entered on August 6, 2004, by the First Circuit Court of Appeals affirming the January 26, 2004 order of this court.

2. The Secretary of Correction hereby wishes to inform this Honorable Court that the Petition for Certiorari filed by the Secretary of Health before the Supreme Court of the United Stats does not change AOC's commitment to comply with this Court's outstanding Orders.

3. To that end, the Secretary of the Department of correction and all the pertinent personnel from the AOC have participate and will continue to actively participate in implementing, with all the parties to this litigation and the Correctional Health Services Corp. (CHSC), this Court's January 26th Order.

WHEREFORE, it is respectfully requested that this Honorable Court take notice of the above for all legal purposes.

Respectfully submitted:

In San Juan, Puerto Rico at this 10th day of November, 2004.

CERTIFICATE OF SERVICE:

I hereby certify that on November 10, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: **Carlos Garcia Gutiérrez, Esq.** to cvgg@civilactioncorp.org, japm@civilactioncorp.org; julaprim@coqui.net; **Eileen Landrón-Guardiola, Esq.** at landronvera@hotmail.com: **Marcos Ramivez Lavandero, Esq.,** mdominguez@rl-assoc.com, camy@rl-assoc.com, marcosram1@yahoo.com.

WILLIAM VAZQUEZ IRIZARRY
Attorney General
of the Commonwealth
of Puerto Rico

SANCHEZ-BETANCES, SIFRE,
MUÑOZ-NOYA & RIVERA, P.S.C.
#33 Bolivia, Suite 500
Hato Rey, Puerto Rico 00917
P.O. Box 195055
San Juan, PR 00919-5055
TEL. (787) 756-7880
FAX (787) 753-6580
gdf@sbsmnr.com

s/ Gerardo de Jesús-Annoni, Esq.
USDC No. 212209
GERARDO DE JESÚS-ANNONI, ESQ.